Supreme Court, U.S.
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NO. 98-1161

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CITY OF ERIE, et al.,

Petitioners,

v.

PAP'S A.M., t/d/b/a/ KANDYLAND,

Respondent

On Writ of Certiorari
To the Supreme Court of Pennsylvania

RESPONDENT'S REPLY BRIEF TO PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Counsel for Respondent

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TABLE OF CONTENTS

I. STATEMENT OF FACTS ---------- 1

II. RESPONDENT'S STATUS AS A VIABLE CORPORATION UNDER PENNSYLVANIA CORPORATION LAW IS NOT A DETERMINATIVE FACTOR. ---------- 1

III. THE CASE DOES NOT FALL WITHIN THE "CAPABLE OF REPETITION, YET EVADING REVIEW" EXCEPTION ---------- 2

IV. FEDERAL COURTS ARE WITHOUT JURISDICTION IN THE ABSENCE OF A CASE-OR-CONTROVERSY ---------- 3

V. RESPONDENT HAS AN OBLIGATION TO RAISE THE QUESTION OF MOOTNESS ---------- 5

VI. RESPONDENT'S OVERBREADTH CHALLENGE IS OF NO SIGNIFICANCE ---------- 5

CONCLUSION ---------- 6

AFFIDAVIT OF NICK PANOS (Respondent's Exhibit 1). ---------- 7

TABLE OF AUTHORITIES

CASES - Federal:

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)---------- 5

Board of License Com'rs of Town of Tiverton v. Pastore, 469 U.S. 239 (1985) ---------- 3, 4, 5

Broadrick v. Oklahoma, 413 U.S. 601 (1973)---------- 6

DeFunis v. Odegaard, 416 U.S. 312 (1974) ---------- 3, 4, 5

Liner v. Jafco, Inc., 375 U.S. 301 (1964) ---------- 3

Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) ---------- 4

Riley v. International Brotherhood of Teamsters, 336 U.S. 930 (1949)---------- 5

Spencer v. Kemna, 523 U.S. 1 (1998) ---------- 2, 3

United States v. Alaska S.S. Co., 253 U.S. 113 (1920) ---------- 3

University of Texas v. Camerisch, 451 U.S. 390 (1981)---------- 6

Weinstein v. Bradford, 423 U.S. 147 (1975) ---------- 2, 3

CASES-State:

Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998)---------- 6

STATUTES:

15 Pa.C.S.A. §101 ---------- 2

OTHER:

R. Stern, E. Gressman, S. Shapiro, & K. Geller, ***Supreme Court Practice*** 721 (7th Ed. 1993)---------- 3

I. STATEMENT OF FACTS

Pap's A.M. is a Pennsylvania corporation. The stock of Pap's A.M. is and has been owned exclusively by Nick Panos of Erie, Pennsylvania.[1] Mr. Panos is the President of Pap's A.M. Pap's A.M. was the owner and operator of an establishment known as Kandyland which was located at 1402 State Street, Erie, Pennsylvania. On October 14, 1994 Pap's A.M. brought an action challenging the Erie Ordinance which is the subject of this case.

In 1998 Pap's A.M. ceased to provide entertainment in the form of nude dancing. The building in which Kandyland was located was sold to a real estate developer who extensively remodeled the building and opened a comedy club. The comedy club does not provide nude dancing nor do Pap's A.M. or Mr. Panos have any interest in that business.

Kandyland no longer exists. Neither Mr. Panos nor Pap's A.M. has any current financial or other interest in any establishment featuring nude dancing. Neither Mr. Panos nor Pap's A.M. has any interest in "Kandy's Dinner Theatre." Mr. Panos, by affidavit, has indicated that neither he personally nor Pap's A.M. has any intention of operating or owning an establishment featuring nude dancing in the future.

II. RESPONDENT'S STATUS AS A VIABLE CORPORATION UNDER PENNSYLVANIA CORPORATION LAW IS NOT A DETERMINATIVE FACTOR

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[1] Attached hereto as Respondent's Exhibit 1 is an affidavit provided by Nick Panos.

The parties agree that Kandyland no longer exists and that Respondent is no longer in the business of providing entertainment in the form of nude dancing. The City contends that this Court should resolve the mootness question by reviewing Pennsylvania's Business Corporation Law (15 Pa.C.S.A. §101 et seq.) to determine whether Respondent has the capacity to sue or be sued.[2] It is respectfully averred that whether or not Pap's A.M. continues to exist as a corporate entity is of no significance to the resolution of the mootness question.

The absence of a controversy is jurisdictional. Article III, Section 2 of the Constitution requires a "case-or-controversy... through all stages of federal judicial proceedings, trial and appellate ..." ***Spencer v. Kemna,*** 523 U.S. 1 (1998). Whether the individual party is an existing person or corporate entity is not determinative.

III. THE CASE DOES NOT FALL WITHIN THE "CAPABLE OF REPETITION, YET EVADING REVIEW" EXCEPTION

The City contends that this case falls within the "capable of repetition, yet evading review" exception, citing ***Weinstein v. Bradford***, 423 U.S. 147 (1975).[3] The City's argument is misplaced.

In ***Spencer v. Kemna, supra,*** the Court stated:

> "[T]he capable- of-repetition doctrine applies only in exceptional situations," *Lyons, supra*, at 109, 103 S.Ct. at 1669, "where the following two circumstances [are] simultaneously present: '

[2] Petitioner's Brief in Opposition, p. 2
[3] Petitioner's Brief in Opposition, pgs. 4-5

> "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again,"

As in ***Spencer, supra,*** and in ***Weinstein, supra,*** the petitioner has not satisfied either condition.

This case does not present an issue involving a challenge to action too short in duration to be fully litigated. Establishments featuring nude dancing can exist indefinitely. Furthermore, there is nothing to suggest that Respondent will again seek to provide nude dancing. Mr. Panos has indicated by affidavit that he and Respondent have no such intention. The City's "speculative contingencies" afford no basis for invoking the exception. ***Board of License Com'rs of Town of Tiverton v. Pastore,*** 469 U.S. 239, 241 (1985) (quoting ***DeFunis v. Odegaard,*** 416 U.S. 312, 320 n. 5 (1974)).

IV. FEDERAL COURTS ARE WITHOUT JURISDICTION IN THE ABSENCE OF A CASE-OR-CONTROVERSY

Respondent has "no personal stake in the outcome" of this lawsuit. ***Spencer, supra.*** No decision on the merits will have an effect on Respondent's substantive rights. Article III of the Constitution requires the existence of a case-or-controversy in order for the federal judiciary to exercise judicial power. ***DeFunis, supra,*** 416 U.S. at 316 (quoting ***Liner v. Jafco, Inc.,*** 375 U.S. 301, 306 n.3 (1964)). The absence of a controversy is jurisdictional which cannot be waived by counsel or disregarded by stipulation. ***United States v. Alaska S.S. Co.,*** 253 U.S. 113, 116 (1920); R. Stern, E. Gressman, S. Shapiro, & K. Geller, ***Supreme Court Practice*** 721 (7th Ed. 1993).

Petitioner cites ***Mesquite v. Aladdin's Castle, Inc.,*** 455 U.S. 283, 289 n. 10 (1982) for the general rule that mere "voluntary cessation of allegedly illegal conduct does not moot a case..." Although Respondent does not disagree with this general rule it is not applicable to the current case.

In ***Mesquite, supra,*** the City of Mesquite eliminated an ordinance restriction while the case was pending in the Court of Appeals. This Court noted that the city could and indeed did intend to reenact the offending legislative provision if the case were declared moot. The Court elected to decide the case on the merits.

The City, relying upon ***Mesquite, supra,*** requests the Court to deny the mootness challenge because the City has not voluntarily abandoned the Ordinance.[4] The City further suggests that there is a "public interest in having the issue settled."[5]

It is respectfully averred that the City's continued support of the Ordinance is of no jurisdictional value. There may be a public interest in having the issue settled. However, the Court is jurisdictionally limited by Article III. There are and will be other cases raising similar if not identical issues which will be subject to the Court's discretionary review.[6]

The Court's decisions in ***DeFunis, supra,*** and ***Tiverton, supra,*** are controlling. Respondent is out of business and has no intent to reenter the business. Its location has been sold. It has no employees. The Writ of Certiorari should be dismissed as moot.

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[4] Petitioner's Brief in Opposition, p. 5
[5] Petitioner's Brief in Opposition, p. 6
[6] See e.g. ***Sammy's of Mobile v. City of Mobile,*** No. 98-994

V. RESPONDENT HAS AN OBLIGATION TO RAISE THE QUESTION OF MOOTNESS.

Counsel has a continuing duty to call to the Court's attention, without delay, facts that may deprive the Court of jurisdiction. ***Arizonans for Official English v. Arizona,*** 520 U.S. 43, 117 S.Ct. 1055, 1069 n. 23 (1997) quoting ***Tiverton, supra,*** 469 U.S. at 240. In ***Tiverton, supra,*** the Court was not advised that the licensee had gone out of business until oral argument.

Respondent's counsel advised the Court of the potential mootness issue immediately upon becoming aware of the circumstances. Counsel would certainly have raised the matter in Respondent's Brief in Opposition had he been made aware of the circumstances. There would have been no reason not to advise the Court at that time.

Respondent does not raise the mootness issue as a "belated attempt to avoid review" as suggested by the City. Respondent has an affirmative duty to advise the Court of all developments which occur at any time regarding the jurisdiction of the Court. ***Tiverton, supra.***

The City requests that if this Court finds that the case has become moot, that the Court vacate the judgment of the Supreme Court of Pennsylvania and remand with a direction to dismiss. Respondent avers that the appropriate action would be to vacate the judgment below and remand for such proceedings as the State Court may deem appropriate. ***Defunis, supra,; Riley v. International Brotherhood of Teamsters,*** 336 U.S. 930 (1949).

VI. RESPONDENT'S OVERBREADTH CHALLENGE IS OF NO SIGNIFICANCE

Pap's A.M. challenged the Erie Ordinance as being constitutionally overbroad. The Supreme Court of Pennsylvania did not address the overbreadth challenge. ***Pap's A.M. v. City of Erie***, 719 A.2d 273, 281 n. 12 (Pa. 1998). The City did not present an overbreadth issue in its Petition for Writ of Certiorari.

The City cites ***Broadrick v. Oklahoma,*** 413 U.S. 601 (1973) for the proposition that a liberal standing standard will be applied in First Amendment areas. The City cites no case in support of its contention that the liberal standing rule applicable in overbreadth challenges would overcome a lack of any stake in the outcome of the case. Furthermore, even assuming *arguendo* that an overbreadth challenge could be considered, the issue presented by the City for review would still be considered moot. See e.g. ***University of Texas v. Camerisch,*** 451 U.S. 390, 394 (1981).

CONCLUSION

For the foregoing reasons, the Respondent's Petition to Dismiss as Moot should be granted.

Respectfully Submitted,

Philip B. Friedman, Esquire
319 West 8th Street
Erie, Pennsylvania 16502
814/452-3069
Counsel for Respondent

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF ERIE

Before me, a notary public, in and for said County and State personally appeared Nick Panos, who being duly sworn according to law deposes and states as follows:

I, Nick Panos, reside at 2410 Clark Road, Erie, Pennsylvania. I am the president and sole shareholder of Pap's A.M., Inc., a Pennsylvania corporation. (hereinafter "Pap's") Pap's was the owner and operator of a club which featured nude dancing known as Kandyland which was located at 1402 State Street, Erie, Pennsylvania. I am and have always been the sole shareholder of Pap's.

Pap's ceased to do business as Kandyland in 1998. The former location of Kandyland, 1402 State Street, Erie, Pennsylvania, was sold to an independent developer in 1998. The location is now a comedy club and does not feature nor present nude dancing. Neither I personally nor Pap's has any interest in the comedy club located at 1402 State Street.

I am 72 years of age. Neither Pap's nor I employ any individuals involved in the nude dancing business. Neither I nor Pap's maintain any contacts in the adult entertainment business. Neither I nor Pap's has any current interest in any establishment providing nude dancing. Neither I nor Pap's has any intention to own or operate a nude dancing establishment in the future.

RESPONDENT'S EXHIBIT 1

Pap's has not yet filed for dissolution but operates no active business. It is a "shell" corporation. A decision on the merits of this case will have no effect upon Pap's or upon me personally.

Nick Panos

Nick Panos

Sworn to and subscribed before
me this 15 day of June, 1999.

Karen A. Lombardo

NOTARIAL SEAL
KAREN A. LOMBARDO, NOTARY PUBLIC
ERIE, ERIE COUNTY, PENNSYLVANIA
MY COMMISSION EXPIRES JAN. 8, 2002